

STATE OF MICHIGAN
COURT OF APPEALS

TERESA F. MITAN,

Plaintiff-Appellant,

v

ROBERT REZNICK and MICHIGAN
SECRETARY OF STATE,

Defendant-Appellee.

UNPUBLISHED

February 1, 2007

No. 271644

Ingham Circuit Court

LC No. 05-001301-CZ

Before: Donofrio, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

Plaintiff, Teresa F. Mitan (Mitan), appeals as of right an order granting summary disposition to defendant Robert Reznick (Reznick)¹ pursuant to MCR 2.116(C)(7) and (8). Because we conclude that Mitan's claims are barred by governmental immunity, we affirm.

A motion under MCR 2.116(C)(7) "tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties." *Glancy v Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998). In making this determination, well-pleaded allegations are accepted as true and construed in favor of the nonmoving party. *Dampier v Wayne Co*, 233 Mich App 714, 720; 592 NW2d 809 (1999). "If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the court to decide as a matter of law." *Poppen v Tovey*, 256 Mich App 351, 354; 664 NW2d 269 (2003).

Mitan's complaint alleged that Reznick's sale of her car at an execution sale constituted conversion. "In the civil context, conversion is defined as any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein. In general, it is viewed as an intentional tort in the sense that the converter's actions are wilful, although the tort can be committed unwittingly if unaware of the plaintiff's outstanding property interest." *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 392; 486 NW2d 600 (1992).

¹ Michigan Secretary of State was dismissed from this case by stipulation, and Mitan does not contest that order on appeal.

Further, “[a]n officer levying on goods under an unlawful writ of attachment or execution, as well as the person taking out and directing the wrongful levy, is chargeable with conversion.” 6 Michigan Civil Jurisprudence, Conversion § 22, at p 30.

MCL 691.1407(2) provides each officer and employee of a governmental agency with governmental immunity. MCL 691.1407(2) expressly states that:

Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:

- (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
- (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
- (c) The officer’s, employee’s, member’s, or volunteer’s conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

Further, “[g]ross negligence” is defined as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(7)(a). “The plain language of the governmental immunity statute indicates that the Legislature limited employee liability to situations where the contested conduct was substantially more than negligent.” *Maiden v Rozwood*, 461 Mich 109, 122; 597 NW2d 817 (1999). This standard of care has also been described as “almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks.” *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004).

The circuit court found that:

The plaintiff has made no allegations in the complaint in avoidance of governmental immunity. Plaintiff has not alleged that defendant, while holding a writ of execution, signed by the circuit court judge, somehow knew on February 22nd, that the Court of Appeals had reversed a portion of the judgment the writ pertained to. But he went ahead and sold the car anyhow.

Mitan did not allege that Reznick knew or had reason to know that she maintained an interest in her car. Further, there is no allegation suggesting Reznick believed he was not acting in accordance with a valid Writ of Execution. Lacking knowledge of Mitani’s interest in her car, Reznick could not have formed the intent to willfully disregard her interest. *Tarlea, supra*. Accordingly, Mitani has failed to plead that Reznick’s conduct was “so reckless as to demonstrate

a substantial lack of concern for whether an injury results.” MCL 691.1407(7)(a). Therefore, the circuit court properly granted summary disposition in favor of Reznick.

Mitan next claims Reznick committed a “fraud in the sale” when selling Mitan’s car for \$200. Specifically, Mitan claims that her car was exempt from sale as a “. . . motor vehicle . . . [that] enables a person to carry on the profession, trade, occupation, or business in which the person is principally engaged, not exceeding in value \$1,000.00.” Further, that MCL 600.6033, provides, in part, that, “[i]f at the sale no bid is made for such property, in excess of the amount of the exemption allowed therein, such property shall not be sold, but shall be returned to the defendant.” Mitan thus claims her vehicle should not have been sold, and that Reznick violated MCL 600.6010 in doing so. That statute provides:

The officer who makes any sale on execution shall, in his return on the execution, specify the articles sold, and the sum for which each article or parcel was sold; and if he is guilty of any fraud in the sale, or in the return, or unreasonably neglects to pay any money collected by him on such execution, when demanded by the creditor therein, he shall be liable in a civil action, brought by the party injured, for 5 times the amount of the actual damages sustained by reason of such fraud or neglect. [MCL 600.6010.]

The circuit court concluded that Mitan failed to plead in avoidance governmental immunity. Specifically, the circuit court held there was no allegation that Reznick sold Mitan’s car “fully aware that an exemption applied to . . . that he went ahead and violated that by selling the car anyway.”

On appeal, Mitan argues that the circuit court improperly interpreted MCL 600.6010 to require Mitan prove an intentional tort, i.e. actual fraud, and not merely constructive fraud. We conclude that regardless whether the circuit court improperly interpreted MCL 600.6010 to require intentional fraud, Mitan failed to plead in avoidance of governmental immunity.

Again, the record reveals that Mitan did not claim her car was exempt under MCL 600.6023(1)(e), and did not allege that Reznick knew or had reason to know that her car was exempt. Further, nothing suggests that Reznick believed he was not acting in accordance with a valid Writ of Execution. Here, Mitan has not alleged that Reznick actions were “so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(7)(a). Therefore, the circuit court properly granted summary disposition in favor of Reznick.

Mitan next argues that the circuit court abused its discretion in denying Mitan an opportunity to amend her complaint.

The grant or denial of leave to amend is within the trial court’s discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). An abuse of discretion exists when the trial court selects an outcome outside those that are reasonable and principled. And, when the trial court selects from one of the principled outcomes, the trial court has not abused its discretion and that decision is entitled to deference. *Dykema Gossett PLLC v Ajluni*, __ Mich App __; __ NW2d __ (2006). See also, *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 372 (2006).

However, MCR 2.116(I)(5) states that, “[i]f the grounds asserted [for summary disposition] are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified.” The circuit court here concluded any amendment would be futile.²

An amendment would be futile if it is legally insufficient on its face. *PT Today, Inc v Comm’r of Financial & Ins Services*, 270 Mich App 110, 143; 715 NW2d 398 (2006). The addition of allegations that merely restate those already made is futile, as are the addition of allegations that still fail to state a claim, or the addition of a claim over which the court lacks jurisdiction. *PT Today, supra*; *Lane v Kindercare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

In requesting reconsideration of the summary disposition order, Mitan requested the complaint be amended to add that Reznick knew her car was exempt from sale under MCL 600.2023, which states that:

(1) The following property of the debtor and the debtor’s dependents shall be exempt from levy and sale under any execution:

* * *

(e) The tools, implements, materials, stock, apparatus, team, vehicle, motor vehicle, horses, harness, or other things to enable a person to carry on the profession, trade, occupation, or business in which the person is principally engaged, not exceeding in value \$1,000.00.

Even assuming Reznick knew the exemption existed, there is no indication that Reznick knew Mitan sought the exemption. Indeed, “the right of exemption can be waived.” *Church v First Nat Bank*, 255 Mich 595, 599-600; 238 NW 192 (1931). Further, assertion of the right of exemption “may be prevented by such laches as work an estoppel.” *Id.* Mitan did not claim the exemption until almost 3 years after the execution sale. In addition, there is no allegation that Reznick knew that Mitan’s car enabled her to carry on the profession, trade, occupation, or business in which the she was principally engaged. Thus, there is no allegation that her car is within the exemption. See Michigan Pleading and Practice, Exemptions, § 50.15, at p 429. The proposed amendment does not plead in avoidance of governmental immunity, and is therefore futile.

Mitan last argues that the circuit court improperly transferred venue on its own initiative. This case was originally brought in Genesee County. Reznick filed a motion to change improper venue under MCR 2.223, which provides that, “[i]f the venue of a civil action is improper, the court (1) shall order a change of venue on timely motion of a defendant, or (2) may order a

² We note that the summary disposition was granted pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(8).

change of venue on its own initiative with notice to the parties and opportunity for them to be heard on the venue question.”

At the hearing, the circuit court held that venue was proper. MCR 2.222(B), provides that, “[i]f the venue of the action is proper, the court may not change the venue on its own initiative, but may do so only on motion of a party.” Mitan specifically argues that Reznick’s motion to change an improper venue under MCR 2.223 does not allow the circuit court to change venue on its own initiative under MCR 2.222. We disagree.

MCR 2.223 states that a circuit court may only change venue on motion of a party. Here, regardless whether Reznick initially sought to change venue under MCR 2.222, he nonetheless filed a motion to change venue. Further, the record of the hearing makes clear that, upon the circuit court’s indication that venue in Genesee County was not improper, counsel for Reznick maintained that change of venue was nonetheless appropriate for the convenience of the parties. Thus, the circuit court complied with MCR 2.223 because it only changed venue after a motion had been filed, and only after Reznick’s counsel maintained that change of venue was still appropriate.

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Brian K. Zahra